UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

ROBIN BETZ, Individually and on Behalf of All Others Similarly Situated,	)	
Plaintiff,	)	Case No.: 2:16-cv-01161-LA
v.	)	Judge Lynn Adelman
MRS BPO LLC,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF MRS BPO LLC'S
MOTION TO DISMISS PLAINTIFF'S COMPLAINT

NOW COMES Defendant, MRS BPO LLC, ("MRS"), through counsel, and submits this memorandum of law in support of its motion to dismiss the complaint filed by plaintiff, Robin Betz ("plaintiff").

I. INTRODUCTION

Plaintiff thinks that MRS violated the Fair Debt Collection Practices, Act 15 U.S.C. 1692, et seq. ("FDCPA"), by sending her a collection letter dated May 26, 2016. Specifically, plaintiff alleges that the letter violates § 1692g because, although MRS's letter contains the 30 day validation notice required by that section, the letter also contains a settlement offer in which the first payment was due within 45 days. Plaintiff claims that MRS's collection letter is deceptive and confusing because the settlement offer supposedly "conflicts with" and "overshadows" the statutorily required 30 day validation language. *Doc. 1, ¶ 32.*

Plaintiff is wrong. Because MRS's settlement offer, on its face, neither conflicts with nor overshadows the 30 day validation notice, plaintiff's complaint should be dismissed for a failure to state a claim upon which relief can be granted, with prejudice. Simply put, the settlement offer did nothing that could affect, compromise or be confused with the validation notice in the letter. Plaintiff's attempt to manufacture liability under the FDCPA fails as she has not, and cannot, allege any facts purporting to show that MRS's letter was false, deceptive, confusing or misleading. As such, this lawsuit should be dismissed with prejudice.

II. STANDARD OF REVIEW

Under Rule 12(b)(6), a defendant may seek to dismiss a complaint for "failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6); *see also Richards v. Mitcheff*, 696 F.3d 635, 637 (7th Cir. 2012) ("A motion under Rule 12(b)(6) tests whether the complaint states a claim on which relief may be granted."). The plaintiff's "factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Zemeckis v. Global Credit & Collection Corp.*, 679 F.3d 632, 635 (7th Cir. 2012).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (citing *Twombly*, 550 U.S. at 557). In short, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do…Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (citing *Twombly*, 550 U.S. at 555, 557).

In *Twombly*, the Court explained the rationale behind adopting a "plausibility" standard, as opposed to a "possibility" standard, in determining the sufficiency of a complaint. The Court reasoned that the "plausibility" standard serves the practical purpose of preventing a plaintiff who lacks a claim from causing a defendant to incur time and expense defending against a plaintiff's claim, and thereby increasing a case's settlement value, when the fact that no claim exists can be determined merely by examining the complaint itself. Indeed, when the complaint ultimately does not state a claim for which relief can be granted, such a deficiency should be exposed at a time when expenditures of time and money by the parties, and the court, are minimal. *Id*., 550 U.S. at 557-58.

III. PLAINTIFF FAILS TO STATE A PLAUSIBLE CLAIM THAT MRS VIOLATED THE FAIR DEBT COLLECTION PRACTICES ACT

A. The Seventh Circuit's Unsophisticated Consumer Standard

In the Seventh Circuit, collection letters alleged to violate the FDCPA are viewed from the standpoint of an "unsophisticated consumer." *Wahl v. Midland Credit Mgmt. Inc., et al.*, 556 F.3d 643, 645 (7th Cir. 2009); *see also Durkin v. Equifax Check Services, Inc.*, 406 F.3d 410, 414 (7th Cir. 2005). While the unsophisticated consumer may be uninformed, naïve, and trusting, she has "rudimentary knowledge about the financial world" and "is capable of making basic logical deductions and inferences." *Id.*

In adopting the "unsophisticated consumer" standard, the Seventh Circuit expressly rejected the "least sophisticated consumer" standard employed by other courts, because the Seventh Circuit does not believe that the applicable standard should be tied to "the very last rung on the sophistication ladder." *Williams v. OSI Educational Services, Inc.*, 505 F.3d 675, 678 (7th Cir. 2007) (quoting *Pettit v. Retrieval Masters Creditor Bureau, Inc.*, 211 F.3d 1057, 1060 (7th Cir. 2000)); *Durkin*, 406 F.3d at 414 (holding that "the unsophisticated-debtor standard is an objective one and is not the same as the rejected least-sophisticated-debtor standard; accordingly, we disregard unrealistic, peculiar, bizarre, and idiosyncratic interpretations of collection letters."). The Seventh Circuit explained this reasoning in *Gammon v. GC Servs., Ltd. P'ship*, 27 F.3d 1254, 1257 (7th Cir. 1994):

> It strikes us virtually impossible to analyze a debt collection letter based on the reasonable interpretations of the least sophisticated consumer. Literally, the least sophisticated consumer is not merely "below average," he is the very last rung on the sophistication ladder. Stated another way, he is the single most unsophisticated consumer who exists.

27 F.3d 1254, 1257 (7th Cir. 1994).

Moreover, the Seventh Circuit has instructed that a letter is not to be evaluated on how it would affect one hypothetical consumer. Rather, under the unsophisticated consumer standard, "a plaintiff's anecdotal proclamations of being confused will not suffice: a collection letter cannot be confusing as a matter of law or fact unless a significant fraction of the population would be similarly misled." *Durkin*, 406 F.3d at 415 (quoting

Pettit, 211 F.3d at 1060). To be unlawfully confusing, the Court must determine whether a letter "could well confuse a substantial number of recipients." *Taylor v. Cavalry Investment, L.L.C.*, 365 F.3d 572, 575 (7th Cir. 2004); *Vazquez v. Fair Collections & Outsourcing, Inc.*, 2913 WL 4659564 (N.D. Ill. 2013). A mere claim of confusion is not enough; a plaintiff "must show that the challenged language of the letters unacceptably increases the level of confusion." *Durkin*, 406 F.3d at 415 (quoting *Johnson v. Revenue Mgmt. Corp.*, 169 F.3d 1057, 1060 (7th Cir. 1999)).

As a general matter, courts review whether a collection letter is confusing under the FDCPA as a question of fact, that if well-pleaded, avoids dismissal on a Rule 12(b)(6) motion. *See McMillan v. Collection Professionals, Inc.*, 455 F.3d 754, 759 (7th Cir. 2006); *Zemeckis*, 679 F.3d at 636. However, a plaintiff fails to state a claim as a matter of law when it is "apparent from a reading of the letter that not even a significant fraction of the population would be misled by it." *Zemeckis*, 679 F.3d at 636 (quoting *Taylor*, 365 F.3d at 574).

This is one of those cases where the Court should dismiss the complaint at this early stage since it is obvious that no consumer could be confused or misled by the language in the letter at issue. MRS should not be made to incur time and expense defending against this claim, when the fact that no plausible claim exists can be easily determined by examining the letter itself and the allegations of the complaint. No reasonable person, unsophisticated or not, would have found this settlement offer misleading or confusing.

B. The Letter Does Not Overshadow The Validation Period

Plaintiff's complaint is founded entirely on the erroneous contention that the 30 day validation notice in MRS's collection letter is overshadowed by a settlement offer that remained open for 45 days, or 15 days *after* the validation period ended. There are no allegations in plaintiff's complaint that MRS's collection letter does not contain the initial validation noticeas required by the FDCPA.

Section 1692g states, in pertinent part, that an initial communication contain a "validation notice" to a consumer that contains:

> (1) The amount of the debt;
>
> (2) The name of the creditor to whom the debt is owed;
>
> (3) A statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
>
> (4) A statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
>
> (5) A statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

Accordingly, the sole question before this Court is whether an offer to settle a debt in an initial communication with a consumer, valid for 45 days, would mislead a significant fraction of the public. *See Zemeckis*, 679 F.3d at 636. Because MRS's collection letter is not misleading or confusing as a matter of law, this Court should dismiss plaintiff's Complaint with prejudice.

In analyzing whether language in a collection letter overshadows § 1692g's validation notice requirement, the Seventh Circuit has instructed district courts to distinguish "between language rushing the debtor to take action—'to act now'—and provisions that set deadlines contrary or contradictory to the thirty-day validation period." *Id.* Here, the 45 day settlement offer is neither contrary nor contradictory to the thirty-day validation period because it exceeds the validation period and reads harmoniously with the validation period.

There is nothing on the face of MRS's collection letter that suggests that both the validation and settlement offer could not be accepted. The letter does not threaten any adverse consequences, such as credit reporting, litigation, or any other negative result. Rather, the settlement offer remained open well after the expiration of the validation notice and if a consumer chose not to accept the offer, she would suffer no adverse consequences. This is not the type of case, like *Bartlett,* upon which plaintiff relied in her complaint, where the collection letter openly threatens a consumer for failing to pay within 30 days. *Bartlett v. Heibl,* 128 F.3d 497 (7th Cir. 1997) (collection letter that threatened litigation if payment was not received within a week overshadowed 30-day validation notice). *See also Chauncey v. JDR Recovery Corp.,* 118 F.3d 516, 518 (7th Cir. 1997) (statement in initial communication with consumer that payment must be received within 30 days to prevent a "decision to pursue other avenues [to collect the debt] contradicted 30-day validation notice); and *Avila v. Rubin,* 84 F.3d 222, 226 (7th Cir. 1996) (30-day validation notice was contradicted by confusing language threatening litigation if payment was not received within 10 days and if validation notice did not apply to consumer). MRS's letter contained none of these immediate deadlines, contradictions or threats.

In *Zemeckis*, the Seventh Circuit affirmed the dismissal of a claim very similar to plaintiff's claim here. *Id.*, 679 F.3d 632. Although the collection letter contained the required 30-day validation notice, it also "urge[d] [her] to take action now," to call "today," and highlighted the creditor's right to pursue action and that her account met guidelines for "legal action." *Id.* The Seventh Circuit affirmed the district court's judgment of dismissal that, as a matter of law, the language requiring urgent action and "repeated threats of legal action" did not overshadow or contradict the 30-day validation notice, and thus the complaint, like here, failed to state a claim. *Id.* at 637.

In comparison to *Zemeckis*, MRS's letter is even more innocuous as it contains no threats of legal action or sense of urgency. Instead, it simply offers the benefit of an option to settle the account for less than the full balance with the first settlement payment not due until 15 days *after* the expiration of the validation period. MRS's letter does not contain any language contradicting the validation notice and there is no demand for payment before the expiration of the 30-day validation period. As such, the letter fairly advises the consumer of her validation rights, does nothing to confuse or undermine those rights, and fully complies with the FDCPA.

C. Plaintiff Fails to Allege Any Material Misrepresentation

In addition to failing to plead that the letter was plausibly confusing or misleading, plaintiff has not alleged any facts showing that the supposed defects are material. When bringing a claim alleging a violation of § 1692e, plaintiff must plead that the misleading statements would cause a significant fraction of the population to act differently. See *Hahn v. Triumph P'ships, LLC*, 557 F.3d 755, 757-58 (7th Cir. 2009) ("[The FDCPA] is designed to provide information that helps consumers to choose intelligently, and by definition immaterial information neither contributes to that objective (if the statement is correct) nor undermines it (if the statement is incorrect)."). Even if a settlement offer is unclear, a plaintiff must "plead facts that show that it is plausible that a reasonable 'unsophisticated consumer' would have done something differently but for the confusing statement." *Marciuleviciene v. Elmhurst Lake Apartment, LLC*, 2012 WL 2374676, at *2 (N.D. Ill. June 21, 2012) (citing *Hahn*, 557 F.3d at 757-58). Under the unsophisticated consumer standard, "a plaintiff's anecdotal proclamation of being confused will not suffice: a collection letter cannot be confusing as a matter of law or fact 'unless a significant fraction of the population would be similarly misled.'" *Durkin*, 406 F.3d at 415 (quoting *Pettit*, 211 F.3d at 1060).

Here, plaintiff has not alleged that even he himself would have made a different decision but for the allegedly confusing or misleading aspects of the collection letter. *See Harrer v. RJM Acquisitions, LLC*, 2012 WL 162281, at *4 (N.D. Ill. Jan. 19, 2012)("Plaintiff himself has not alleged that he was confused or misled when he received the collection letter and the Court concludes that the reasonable unsophisticated consumer would not be confused either."). Plaintiff has also not alleged that he or anyone else would have acted differently had the settlement offer been for a different time period. Indeed, plaintiff makes no allegations whatsoever regarding what he did or would have done in response to the letter he actually received, or to the hypothetical letter he believes should have been sent. Significantly, plaintiff does not say what an unsophisticated consumer would have done in response to the letter. The reason for plaintiff's failure to include such factual allegations is obvious - no such facts exist. Plaintiff has failed to plausibly allege that the settlement offer made in MRS' letter would, or could, negatively influence the decision of a consumer.

IV. CONCLUSION

It is not plausible that a "significant fraction of the population" would be confused or misled by MRS' letter; in fact, it is not even plausible that any consumer would be confused or misled by it. Because plaintiff fails to plead any plausible basis for holding MRS liable under the FDCPA, this Honorable Court should dismiss plaintiff's claims with prejudice.

Respectfully submitted,

/s/ Daniel W. Pisani

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CERTIFICATE OF SERVICE

I certify that on December 5, 2016, the foregoing was filed electronically in the ECF system. Notice of this filing will be sent to the parties of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Daniel W. Pisani